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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of 47 C.F.R. § 1.1200
et seq. Concerning Ex Parte
Presentations in Commission
Proceedings

GC Docket No. 95-21

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To: The Commission

COMMENTS OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION

The Federal Communications Bar Association (the "FCBA" or "Association"), a non-profit, non-stock corporation organized under the laws of the District of Columbia in existence since 1936, by its undersigned representatives and in accordance with Section 1.415 of the Commission's Rules, hereby respectfully submits its Comments in response to the Notice of Proposed Rulemaking in this proceeding, FCC 95-52, adopted and released on February 7, 1995, 60 Fed. Reg. 8995 (February 16, 1995) (the "Notice").^{1/}

^{1/} These Comments are submitted in a timely fashion, in accordance with the Order of the Commission's General Counsel, DA 95-490, adopted March 13, 1995 and released March 15, 1995, which extended the date for filing comments in this proceeding to April 13, 1995.

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1. The FCBA's membership consists of more than 2,400 communications lawyers and other professionals having an interest in the development of communications law and policy. As such, the Association and its members are vitally interested in the matters raised in the Notice. On a regular basis in the conduct of their profession, lawyers practicing before the Commission are called upon to counsel their clients with respect to compliance with the Commission's ex parte communications rules and to promote such compliance. Indeed, no other organization's membership is likely to be as significantly affected by the changes in those rules proposed in the Notice as is the FCBA's membership. ^{2/}

2. The FCBA commends the Commission for its decision to revisit the ex parte communications rules. As the Notice recognizes, the last major rewriting of those rules occurred in 1987. ^{3/} Experience accumulated under those rules during the last eight

^{2/} The views expressed in these Comments represent the views of a substantial majority of the members of the Executive Committee of the FCBA, its elected board of directors. One member of the Executive Committee, who is an employee of the Commission, did not participate in the discussion or consideration of these Comments or in the vote to authorize their filing with the Commission. The views expressed herein also represent the views of the FCBA's Ex Parte Rules Committee and are consistent with the views of most of the members of the Association who have responded to invitations in letters to the Association's chapters and substantive practice committees, at a monthly luncheon, and in the FCBA News, to advise the Chair of the Ex Parte Rules Committee of their views. These Comments do not, of course, necessarily represent the views of all members of the Association. The Executive Committee and the Chair of the Ex Parte Rules Committee have done the best that they could within the time permitted in the General Counsel's Order, footnote 1, supra, to ascertain a consensus in the views of the Association's membership and to reflect them in these Comments.

^{3/} Notice, at Para. 3 and n. 2.

years suggests that refinements to the rules can be made which will improve the manner in which the Commission dispatches its business, while preserving the public's need to have access to the agency's decision-making process and both the integrity and the appearance of integrity of that process.

3. The FCBA concurs in the Notice's view that the ex parte communications rules can be written and organized in a manner that makes them more "user-friendly." A format that avoids excessive cross-referencing to other rules in order to provide definitions or to establish exceptions to a rule, but that instead incorporates those definitions and exceptions within the body of the rule itself, is preferable to the current regulatory scheme, the cumbersomeness of which is acknowledged in the Notice. Id., at Paras. 10-13. ^{4/}

4. The FCBA supports the use of a "permit-but-disclose" regimen to govern the making of ex parte presentations in policy-oriented informal rulemaking proceedings. Notice, at Para. 23. It is not uncommonly the case that the important issues that may have to be decided in such proceedings have not been fully joined or refined in the process of filing opening comments and replies thereto. Following the close of the authorized comment-and-reply filing periods, the arguments of the parties may continue in a manner which sharpens the issues to be decided by the Commission, or which takes into account intervening technological, economic, or other developments. Allowing that

^{4/} The FCBA endorses the Notice's proposal to discard the misleading term "non-restricted proceeding" and to substitute in its stead the more accurate and plain-English term "permit-but-disclose proceeding."

debate to continue after the filing of reply comments, by means of "permit-but-disclose" presentations, will help the Commission to craft better-informed rules and policies than would be the case if ex parte communications were prohibited or unduly inhibited. The requirement that such presentations be disclosed on the record enables all parties to follow the progress of the argumentation and to rebut other parties' submissions, to the extent deemed necessary.

5. The Association submits that any oral ex parte presentation made in the course of a policy-oriented informal rulemaking proceeding should be disclosed in a written memorandum for inclusion in the record of the proceeding. However, the Association disagrees with the proposal in the Notice, at Para. 45, to require the presenter to prepare and submit an independent written summary of an oral ex parte presentation, if in fact the presentation merely repeated matters that have been previously submitted in writing on the presenter's behalf in that proceeding. In such instances, the presenter should be allowed simply to refer to the previous written submission and to state that the oral ex parte presentation was confined to matters reflected in that submission. There is no justification for putting a party to the labor and expense of writing out, in a "permit-but-disclose" memorandum, what that party has already written out and included in the record. Of course, in those instances when the oral ex parte presentation has included matters not contained in a previous written submission on the presenter's behalf in the proceeding, the presenter should be required to disclose in a written memorandum a summary of such matters for inclusion in the record.

6. The FCBA does not support the Notice's proposal to extend the "permit-but-disclose" procedure to adjudicatory or quasi-adjudicatory proceedings. Notice, at Paras. 19-22. In such proceedings, the Commission is called upon to exercise judicial or quasi-judicial functions in resolving conflicting claims of individual litigants. A procedure that would permit such litigants to make a personalized ex parte presentation to a Commission decision-maker -- with only the requirement that a sterile written summary of the presentation be prepared and filed -- would distort and compromise the adjudicatory process in several ways.

7. First, any response that could be made to an oral ex parte presentation in an adjudicatory or quasi-adjudicatory proceeding could never fully comprehend, and therefore could not respond to, precisely the argument or mode of argument that had been made in the presentation, particularly where the memorandum of the oral presentation was ambiguous or elliptical (albeit minimally complete). There would have been no opportunity to have observed the decision-maker's reaction to the oral ex parte presenter's arguments and delivery, and to craft a response specifically directed to that delivery and to that reaction. Indeed, the response cannot encompass all of the prior oral ex parte presentation, even in cases where the memorandum summarizing the presentation is relatively thorough, since by definition a summary is just that and will never completely render the whole of the presentation. Second, the decision-maker would typically be receiving the opposing oral ex parte presentations sequentially at points that may be substantially separated in time, with the obvious danger that the latest presentation

would be the one that would have the greatest impact. Third, ex parte presentations in adjudicatory and quasi-adjudicatory proceedings would inevitably color public perceptions of the Commission's processes and would undermine confidence in those processes. That result is by no means worth the marginal gains in administrative simplicity and clarity that might result from extending the "permit-but-disclose" procedures to adjudicatory and quasi-adjudicatory proceedings.

8. Finally, were the Commission to permit the argumentation to continue beyond the close of the authorized pleading cycle by means of "permit-but-disclose" ex parte presentations, the integrity of the authorized pleading cycle would be severely compromised. Thus, for example, a party whose principal objective in a given adjudicatory or quasi-adjudicatory matter is to foster delay for the purpose of maintaining the status quo as long as possible would have no incentive to include his or her best arguments within the confines of the authorized pleading cycle. Rather, such a party might choose to postpone the delivery of his or her most effective argument for post-pleading-cycle "permit-but-disclose" ex parte communications, on the theory that delay is most effectively promoted by deferring the point in time when the decisional issues are joined (and, perhaps, in the hope that the opposing party will not discover that the ex parte communication had been made and thus will leave the argument unrebutted).

9. Even if the delay-seeking litigant has made his or her most effective argument within the confines of the authorized pleading cycle, he or she could still

forestall the Commission's adjudication of the matter by repeatedly supplementing the record with colorably non-frivolous presentations made to Commission decision-makers, either orally or in writing, pursuant to a "permit-but-disclose" procedure. In those events, the costs to the parties of participating in contested adjudicatory and quasi-adjudicatory proceedings would rise, and the delay in obtaining final dispositions by the Commission would likewise increase. No apparent public interest would be served by such a procedure that cannot equally well be served by requiring parties in such proceedings -- when they feel a need to supplement the authorized pleadings -- to submit such supplementation in the form of a written presentation, accompanied by a motion for leave to submit the same outside of the authorized pleading cycle, and with service of copies of both supplement and motion upon all interested parties. ^{5/}

^{5/} In the event that the Commission should decide over these objections to extend "permit-but-disclose" procedures to adjudicatory and quasi-adjudicatory proceedings, the FCBA strongly urges the Commission to require that any written presentation, or any written memorandum disclosing an oral presentation, be promptly served by the maker of such presentation upon all interested parties and not simply filed with the Commission for inclusion in the record of the proceeding. Service by mail, facsimile, or hand delivery reliably ensures that other interested parties will have actual knowledge of the presentation. Mere submission of a written disclosure to the Commission for inclusion in the record of the proceeding would burden every interested party to maintain a continuing vigilance over every file involving a contested adjudicatory or quasi-adjudicatory proceeding, substantially driving up the cost of participating in such proceedings and running the risk that a clerical misfiling by Commission staff could deprive interested parties of actual knowledge of a merits presentation by an opponent. Furthermore, a delay in the filing by the Commission's staff of the memorandum summarizing an oral *ex parte* presentation might result in Commission disposition of the matter before other interested parties would even be aware that the presentation had been made. Under those circumstances, parties would be constrained to maintain an almost daily surveillance of the Commission's records in order to protect their interests, an unwarranted cost burden.

10. The FCBA recommends one modification to the existing ex parte communications rules governing adjudicatory or quasi-adjudicatory proceedings. The FCBA believes that parties should be permitted to make oral inquiries to Commission decision-making personnel in such proceedings concerning the status of the matter and a projected date for action by the Commission or its staff in the matter, without requiring advance notice to other interested parties and an opportunity for them to be present. Such inquiries should continue to be permissible so long as they are confined to (i) a legitimate query as to status and a projected date for disposition, or (ii) a request for prompt disposition based solely upon the age of the proceeding. Where, however, an inquiry includes an affirmative appeal to Commission decision-makers for action by a date certain, or refers to the particular circumstances of the case at hand as a basis for a request for prompt disposition, ^{6/} then the party making such an appeal should be required to prepare a written memorandum of the substance of the conversation and serve copies upon all other interested parties. To that limited extent, a "permit-but-serve" regimen would be appropriate in adjudicatory and quasi-adjudicatory matters, inasmuch as other interested parties would receive actual notice that an appeal for Commission disposition, making reference to the specific circumstances of the matter, had been made

^{6/} For example, a party might wish to call to the Commission's attention the fact that contractual rights will expire on a given date in the future, that the party has an urgent need to be able to liquidate a property that cannot be sold without Commission consent in order to satisfy creditors or taxing authorities, or that delay in resolving a matter at the Commission is harming the interests of persons other than the parties to the proceeding, e.g., where such persons are depending upon the initiation of a service whose authorization is the subject of the proceeding.

to Commission decision-makers and any rebuttal, if warranted, could likewise be made on the record.

11. The FCBA submits that while the Commissioners, their staffs, and other decision-making personnel at the agency should retain discretion to meet or not to meet with interested parties in proceedings that are subject to "permit-but-disclose" procedures, Notice, at Para. 30, that discretion should never be exercised to refuse to meet with an interested party if a meeting was previously afforded to one or more other interested parties in the same proceeding. Fundamental fairness dictates that once the decision-maker has entertained a presentation in a matter, he or she should not decline presentations by others having an interest in, and a different position with respect to, the issues to be decided in that matter.

12. The Association endorses, with one modification and one caveat, the Notice's proposal to relieve both interested parties and Commission decision-making personnel appearing on public panels and at widely-attended seminars from the strictures of the ex parte communications rules during the so-called "Sunshine Period." Notice, at Para. 41. The FCBA would modify that proposal by extending the exemption from the ex parte communications rules to both passive attendance and active participation on the part of Commission decision-making personnel and interested parties at such panels, seminars, and sessions, whether during or outside of the Sunshine Period. See Notice, at Para. 42, n. 22. Under those circumstances, "permit-but-disclose" would not apply, and any presentations -- to the extent that they may be deemed to be "presentations" -- would be

exempt from the rules.^{2/} As a caveat to that modification, the FCBA would extend that exemption only to actual attendance at and participation in the panel, seminar, or session at which one or more Commission decision-makers are present; the exemption would not extend, for example, to a merits presentation made to Commission decision-making personnel before or after the public part of the event or during the course of a multi-event meeting, convention, or trade show occurring outside of the panel, seminar, or meeting at which the decision-maker(s) is/are present.

13. The FCBA supports the Notice's proposal to extend to three days' time the period in which written memoranda disclosing the substance of oral presentations in "permit-but-disclose" proceedings may be submitted. Such an extension will afford parties the time needed to prepare a meaningful disclosure of what actually transpired in the course of the oral presentation.

14. Likewise, the FCBA welcomes the proposal in the Notice to require that, in situations where the permissibility of making an ex parte presentation is unclear, the party proposing to make the presentation must first alert the Office of the General Counsel. This cautionary approach will serve the interests of the public and its representatives, as well as the Commission, in helping to avoid inadvertent rule violations. The FCBA also supports the Notice's proposal to centralize in the General Counsel's

^{2/} Consistent with the views expressed in Paragraphs 6 through 9, supra, this exemption should only apply to policy-oriented informal rule making proceedings and should not be available in adjudicatory or quasi-adjudicatory proceedings.

Office the responsibilities for administering, interpreting, and enforcing the ex parte communications rules.

15. In closing, the FCBA wishes again to commend the Commission for initiating this timely review of the ex parte communications rules and for affording an opportunity for comment thereon by the public, including those having an interest and desire to maintain both access to Commission decision-making and the fairness and the appearance of fairness of the Commission's processes.

Respectfully submitted,

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